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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

CALVIN BEGAY, et al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Alan R. Taradash
DNA-People's Legal Services, Inc.
Post Office Box 306
Window Rock, Arizona 86515
Telephone: (602)871-4151

Counsel for Petitioners

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QUESTIONS PRESENTED

1. Whether the doctrines of "stare decisis" and the "law of the case" preclude the entry of summary judgment in favor of defendant on an issue previously ruled upon in the same proceedings and in conformity with previous, similar decisions of the same court.

2. Whether in light of the pleadings and all of the affidavits in the record the Court of claims erred in granting the defendants motion for summary judgment.

3. Whether 43 C.F.R. Part 4 applies to administrative proceedings adjudicating claims brought under Articles I and VI of the Treaty of 1868 between the Navajo Tribe and The United States where there has been no prior administrative decision in the matter.

4. Whether petitioners, Indian Treaty claimants were denied due process of law where their claims were "adminis-

tratively adjudicated" in a hearing not conducted by an administrative law judge and not in accordance with the procedural requirements of 43 C.F.R. Part 4.

5. Whether uncontradicted affidavits as a matter of law cannot establish credible evidence for the requisite proof of a claim made under Article I of the Treaty of 1868 between the Navajo Tribe and The United States.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF CLAIMS WHOSE ORDER IS SOUGHT TO BE REVIEWED

The petitioners herein each filed claims on October 17, 1977 against the United States in the Court of Claims. All of those causes were consolidated by order of that court on December 19, 1977. The petitioners herein are plaintiffs in Court of Claims Nos. 505-77 through 515-77 and are as follows:

505-77 CALVIN BEGAY, VELMA BEGAY, DAISY BENALLY

506-77 MARJORIE BEGAYE, ROY BEGAYE, SHIRLEY WEAVER

507-77 BESSIE BENALLY, JACQUELINE BENALLY, LITTLE JOHN BENALLY

508-77 CLARENCE FRANK, MINNIE FRANK, FREDA FRANK

509-77 ANNA GEORGE, FRANK GEORGE, SANDRA GEORGE

510-77 ALBERT JOHNSON, ROSEMARY JOHNSON, SHARON JOHNSON

511-77 CORDELLA ROCKWELL, CRYSTAL ROCKWELL, PAULINE ROCKWELL

512-77 HENRY SALTCLAH, MARY SALTCLAH, SYLVIA SALTCLAH

513-77 HELEN TAPAHA, MARY ANN TAPAHA, ROBERT TAPAHA

514-77 ETTA TOM, JIMMIE TOM, MARY LOUISE TOM

515-77 BETTY YAZZIE, DONALD YAZZIE, LILLIE YAZZIE

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the order of the Court of Claims entered in these proceedings on June 27, 1980, and the denial of petitioners' request for rehearing en banc entered on October 3, 1980.

ORDERS/OPINIONS BELOW

The order of the Court of Claims entered on June 27, 1980 is unreported but is printed in the Appendix at page 1-A. The order of the Court of Claims entered on October 3, 1980 is unreported but is printed in the Appendix at page 10-A.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 United States Code Section 1255(1) to review a decision of the United States Court of Claims entered on June 27, 1980, and to review the order of that court denying a timely motion for rehearing entered on October 3, 1980.

STATUTES, TREATY PROVISIONS and REGULATIONS INVOLVED

1. Articles I, IV, and VI, The Treaty of 1868 between the Navajo Tribe and the United States:

Treaty between the United States of America and the Navajo Tribe of Indians; Concluded June 1, 1868; Ratification advised July 25, 1868; Proclaimed August 12, 1868 (15 Stat. 667)

ANDREW JOHNSON,

President of the
United States of America,

To all and singular to whom these presents shall come, greeting:

WHEREAS a treaty was made and concluded at Fort Sumner, in the territory of New Mexico, on the first day of June, in the year of our Lord, one thousand eight hundred and sixty-eight, by and between Lieutenant-General W.T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States and Barboncito Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

ARTICLES of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W.T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo Nation or tribe of Indians, repre-

sented by their chiefs and head-men, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and head-men being hereto subscribed,) of the other part, witness:

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and

regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

. . . .

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

. . . .

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to

to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

. . . .

2. 43 C.F.R. Part 4 Subpart G

Subpart G - Special Rules of Applicable to Other Appeals and Hearings

AUTHORITY: 5 U.S.C. 301.

§4.700 Who may appeal.

Any party aggrieved by an adjudicatory action or decision of a Departmental official relating to rights or privileges based upon law in any case or proceeding in which Departmental regulations allow a right of appeal to the head of the Department from such action or decision, should direct his appeal to the Director, Office of Hearings and Appeals, if the case is not one which lies within the appellate review juridiction of an established Appeals Board and is not excepted from the review authority delegated to the Director. No appeal will lie when the action of the Departmental official was based solely upon administrative or discretionary authority of such official.

[36 FR 7186, Apr. 15, 1971; 36 FR 7588, Apr. 22, 1971]

§4.701 Notice of Appeal.

The appellant shall file a written

notice of appeal, signed by him or by his attorney or other qualified representative, in the Office of the Director, within 30 days from the date of mailing of the decision from which the appeal is taken. The notice shall contain an identification of the action or decision appealed from and give a concise but complete statement of the facts relied upon and the relief sought. The appellant shall mail a copy of the notice of appeal and accompanying statement of reasons therefor, and any written arguments or briefs, to each party to the proceedings or whose rights are involved in the case, and to the Departmental official whose action or decision is being appealed. The notice of appeal shall contain a certificate setting forth the names of the parties served, their addresses, and the dates of mailing.

§4.702 Transmittal of appeal file.

Within 10 days after receipt of a copy of the notice of appeal, the Departmental official whose action or decision is being appealed shall transmit to the Office of the Director the entire official file in the matter, including all records, documents, transcripts of testimony, and other information compiled during the proceedings leading to the decision being appealed.

§4.703 Pleadings.

If the parties wish to file briefs, they must comply with the following requirements: Appellant shall have 30 days from the date of filing of his notice of appeal within which to file an opening brief, and the opposing parties shall have 30 days from the date of receipt of appellant's brief in which to file an answering brief. Additional or rebuttal

briefs may be filed upon permission first obtained from the Director or the Ad Hoc Appeals Board appointed by him to consider and decide the particular appeal. Copies of all briefs shall be served upon all other parties or their attorneys of record or other qualified representatives, and a certificate to that effect shall be filed with said brief.

[36 FR 7186, Apr. 15, 1971; 36 FR 7588, Apr. 22, 1971]

§4.704 Decisions on appeals.

The Director, or an Ad Hoc Appeals Board appointed by the Director to consider and decide the particular appeal, will review the record and take such action as the circumstances call for. The Director or the Ad Hoc Appeals Board may direct a hearing on the entire matter or specified portions thereof, may decide the appeal forthwith upon the record already made, or may make other disposition of the case. Upon request and for good cause shown, the Director or an Ad Hoc Appeals Board may grant an opportunity for oral argument. Any hearing on such appeals shall be conducted by the Ad Hoc Appeals Board or a member or members thereof, or by an administrative law judge of the Office of Hearings and Appeals and shall be governed insofar as practicable by the regulations applicable to other hearings under this part.

STATEMENT OF THE CASE

Petitioners, eleven Navajo girls (and their parents or guardians), separately sued the United States in the Courts of Claims under Articles I and VI

of the Treaty of 1868 between the Navajo Tribe and the United States, 15 STAT. 667 (hereinafter referred to as the Fort Sumner Treaty). The jurisdiction of the Court of Claims was invoked under 28 U.S.C. §1491. The individual cases were consolidated by order of the court. The Navajo girls were each sexually abused and assaulted at a Bureau of Indian Affairs boarding school by male teachers, counsellors or faculty aides. The petitioners alleged that such actions constituted compensable wrongs under Articles I and VI of the Fort Sumner Treaty.

The United States moved to dismiss the claims claiming, among other things, that the petitioners had not exhausted their administrative remedies. The Court of Claims denied the motion, ruling squarely on the issue of exhaustion. January 26, 1979 Order, Appendix page 12-A. In its order the court suspended further court proceedings for a period of 90 days to allow the Assistant Secretary of

Interior to make a decision on the claims. The Assistant Secretary held a hearing and decided against honoring petitioners' claims. The respondent then filed a motion for summary judgment on the grounds that the petitioners failed to state a claim upon which relief can be granted. The Court of Claims granted the motion and dismissed petitioners' claims on the basis of petitioners' failure to exhaust administrative remedies and properly challenge the administrative decision. June 27, 1980 Order, Appendix, page 1-A. The petitioners filed a timely motion for rehearing en banc. The court denied that motion. October 3, 1980 Order, Appendix page 10-A.

The petitioners' claims are based on and rooted in solemn promises made to their ancestors at Fort Sumner in 1868 as memorialized in the Fort Sumner Treaty of 1868. Although incarcerated at the time, petitioners ancestors relinquished aboriginal claims to vast tracts

of land and agreed to live in peace on a limited Reservation. All of the Navajo signators to the Treaty were illiterate; the members of the United States Indian Peace Commission such as Lt. Gen. Wm. T. Sherman and S. F. Tappan were not.

A major concern of those who negotiated the Treaty was that sudden outbreaks of hostilities, caused by random acts of violence committed by Navajos or whites, cease. To promote this purpose language was specifically placed in Articles I and IV to provide a vehicle for asserting claims arising out of such violence. The respondent has taken the position that as a matter of law only testimony under oath subject to cross examination can be deemend credible for evidentiary purposes; and, further, that the United States has a very limited duty when presented with an Article I Treaty claim brought by a Navajo, namely, to provide an administrative assistant to

conduct a hearing where the claimant must prove his case. The petitioners disagree with both of these assertions.

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REASONS FOR GRANTING THE WRIT

There are eight other Indian tribes that have treaties with the United States which are almost identical to that of the Navajo Tribe. The Court of Claims Order of June 27, 1980 granting the respondent's motion for summary judgment directly conflicts with the leading case on such treaty claims, viz. Hebah v. United States, 192 Ct. Cl. 785, 428 F.2d 1334 (1970). Hebah was the first case to decide the requirements for "exhaustion of administrative remedies" for purposes of Article I Treaty Claims such as petitioners' herein. In rejecting a defense similiar to that raised by the United States in these cases the Court of Claims stated:

> The other point relates to the treaty requirement that a wronged Indian shall make proof to the "agent", which proof shall be "forwarded to the Commissioner of Indian Affairs at Washington City." The petition alleges that

> claim was made upon the Superintendent of the Wind River Indian Agency and a copy sent to the Commissioner of Indian Affairs in Washington. If those assertions are true, plaintiff has fulfilled the only prerequisite to suit required by the treaty, and all administrative remedies have been exhausted.

Hebah at 795.

Relying on Hebah petitioners made a claim and presented proof to the Navajo Area Director of the Bureau of Indian Affairs prior to filing suit against the United States. The Court of Claims firmly rejected the "exhaustion defense" raised by the United States in its Order of January 26, 1979. Appendix, page 12-A. The court very clearly stated that claimants had complied with the requirements of Hebah and detailed many of the "proofs" which had been presented to the government. Indeed the Court itself questioned the "good faith" of the respondent in its handling of the claims:

Obviously there was sufficient information for the Interior Department to go forward to investigate the treaty claims formally filed on September 30, 1977. We have been given no reason why this was not done, except that the defendant felt that it could get the petitions dismissed on the technical ground that insufficient time had elapsed at the moment of filing. This seems to us no defense at all now that over a year has elapsed.

The unexcused failure to pass on the Article I treaty claims in the fifteen months since the petitions were filed[3/] might well warrant our now considering the claims to have been administratively denied through unreasonable delay, but in view of the specific references in Article I to administrative consideration[4/] we will not take that course but will allow the Department a period of ninety (90) days from the date of this order in which to make a decision upon the treaty applications filed by plaintiffs. No extension of time will be granted except for truly extraordinary circumstances. Meanwhile further

proceedings in this court will be suspended.

Order of January 26, 1979, Appendix, page 12-A.

That ruling became the "law of the case" and petitioners were entitled to rely on it as the Court of Claims has repeatedly recognized. See, e.g., United States v. Delaware Tribe, 427 F.2d 926, 930 (Ct. Cl. 1972).

In ruling upon respondent's motion for summary judgment the Court of Claims was first obligated to determine whether there existed any genuine issue as to any material fact. In its motion respondent raised a variation of its administrative exhaustion argument and it further made the two fold assertion that the Secretary's decision was both unchallenged and "binding." In response to this assertion and the pages of rank hearsay that accompanied the respondent's motion as Attachments, petitioners filed a Motion

to Strike or Exclude on January 17, 1980. That Motion was filed simultaneously along with Plaintiffs Opposition and Brief in Response to Defendants Motion for Summary Judgment wherein in Plaintiff's Exhibit A, Affidavit of Attorney for Plaintiffs pursuant to Rule 101(g), Appendix infra at page 21-A, petitioners advised the court that if the lawfulness or bad faith of the Secretary's decision of 26 April 1979 was an issue in the eyes of the court that discovery and an evidentiary hearing would show that administrative process and the Secretary's decision were a denial of due process rights of the petitioners. Nevertheless, the Court of Claims denied Plaintiffs Motion to Strike or Exclude and granted Defendants Motion for Summary Judgment when the facts surrounding the administrative hearing are clearly in dispute.

First the Order of June 27, 1980, repeatedly refers to the notion that

the Court's Order of January 26, 1979 ordered an administrative hearing. Appendix infra at page 12-A. If that were true then much of what that court inferred from the facts may have greater validity. But that court never ordered an administrative hearing. The order of January 26, 1980 merely suspended further court proceedings for 90 days to allow the Secretary additional time within which to make a decision. At the very least if that court viewed the good faith of the parties to the administrative process an issue, then the material facts relevant thereto were and are genuinely in dispute upon any fair examination of the entirety of the record before that court and the granting of summary judgment was therefore, improper.

Secondly, the Treaty definitions of "proofs" and "binding" are not self defining terms. Therefore, it is necessary to make a factual determination under the accepted rules of Indian Treaty construction to determine their meaning. The only factual material submitted to this Court on the intent of the signatories to the Navajo Treaty of 1868 is contained in Plaintiffs' Appendix to its Opposition Brief. A fair reading of those materials strongly suggests that testimony under oath was never contemplated as the only means of providing "proof" to the Secretary. Indeed, Hebah stands for that very proposition. The Defendant complains that it has not had the opportunity to investigate and determine the facts ostensibly because of the "truculence" of plaintiffs' counsel. The court's order of June 27, 1980 adopts that suggestion in disregard of the facts.

Petitioners have over a period of years submitted a variety of kinds of

evidence to the respondent. To cite but a few examples, respondent received from petitioners tape recorded interviews of the offender, DeBoef and his superiors (all employees of Respondent) which showed that there were material discrepancies in the factual account of each. (Affidavit of Alan R. Taradash. Appendix infra at page 25-A. The results of a polygraph exam taken and failed by DeBoef were offered to respondent, (Id.); The psychiatrist who had been treating the petitioners herein was brought from California at petitioners' expense to meet with Donald Dodge, BIA Area Director. (Affidavit of Carolyn E. Slaby and Alan R. Taradash. Appendix infra at page 29-A. In short, the overwhelming weight of the evidence submitted or made available to defendant established the "proof" contemplated by the Treaty. Under any reasonable standard of review the administrative determination herein was incorrect and an abuse of discretion.

It was also, however, a denial of due process. Contrary to the assertion in the court's Order of June 27, 1980.

As this Court has long recognized, summary judgment should be cautiously invoked so as not to improperly deprive a litigant of a trial of disputed factual issues. Associated Press v. United States, 326 U.S. 1 (1945). The order for which review is herein sought is directly contrary to that rule.

The respondent has asserted that the "administrative hearing it held was governed by the procedural standards provided in 43 C.F.R. Part 4, Subpart G. Affidavit of Frances A. Patton, Appendix infra at page 40-A.

An examination of Part 4 which the respondent contends governed the administrative hearing is very instructive. By its very terms, Subpart G applies only to appeals from administrative action. Here there was no administrative action to

appeal. The hearing in question was conducted prior to any decision on the claims. The very sentence cited by Ms. Patton in Par. 3 of her affidavit expressly refers to appeals, not to fact finding hearings in other contexts. Thus, Subpart G could not have been the governing regulation.

Nonetheless, even if Subpart G could be applied to hearings other than those held in appeals, a review of the administrative record in this case would demonstrate that the administrative hearing did not comply with the procedural standards established by Subpart G.

It cannot seriously be disputed that the hearing of 28 March 1979 was an adjudicatory hearing within the meaning of that term as defined by the Administrative Procedure Act. The hearing was an integral part of the Department's procedure for the formulation of a final agency disposition of the claims before the Depart-

ment. See 5 U.S.C. Section 551(6) and (7). Davis, Administrative Law Treatise, Section 7.02. The "Findings and Recommended Decision" Ms. Patton based on the hearing expressly held the claimants' factual evidence to be inadequate and denied the claims on that basis.

Section 4.24(a)(3) provides that the "record" shall be the sole basis of the decision; Section 4.24(a)(1) defines the "record" as the transcript of testimony, exhibits, and other "papers and requests filed in the hearing" (emphasis added). Here, Assistance Secretary Gerard's decision was based in part on excerpts from documents and other factual assertions submitted by William Back, Navajo Area Field Solicitor, 15 days after the hearing. Even a cursory review of the record would show that virtually all of the material submitted by him after the hearing was in his actual possession on the date of the hearing.

Yet he did not offer these documents and other materials at the hearing. Assistant Secretary Gerard's letter of 9 March 1979, informing claimants of the hearing date, did state that "modifications" of the proposed findings could be submitted after the parties received copies from Ms. Patton. However, this reference to "modifications" can hardly be read as notice that the Department intended to ignore the requirements of Section 4.24(a)(3) by allowing the government to submit its evidence following the hearing, even though that evidence was in the government's possession at the time of the hearing.

Section 4.24(a)(4) provides that no decision shall be based on any record, statement, file or similar document which is not open to inspection by the parties. Here Field Solicitor Back's submittal is replete with references to letters, investigations, reports and other documents never made available to the

claimants despite repeated requests for access to whatever evidence the government had. The Department has never allowed these claimants to see the documents and files from which Mr. Back gleaned the factual assertions which were included as part of the record by Assistant Secretary Gerard. The Department did not inform claimants prior to the hearing that Subpart G would govern; and as shown above, claimants could not have guessed that Subpart G was to be applied, since by its very terms it applies only to appeals from administrative actions, and Subpart G by itself contains no procedural rules at any rate. Aside from the Department's failure to inform claimants which set of alternative regulations it intended to apply through Subpart G, it is clear that the Department did not in fact follow any of the alternative sets of regulations. The Department gave only 19 days notice of the hearing. The only set of regula-

tions allowing less than 20 days notice is Subpart C, governing contract appeals. Yet, a review of the record will show that the Department did not follow other provisions of Subpart C governing prehearing briefing (Section 4.110), pre-hearing conference (Section 4.111), discovery (Section 4.115 and 4.116), unexcused absence of a party (Section 4.120), or posthearing briefing (Section 4.123).

It is abundantly clear that the Department did not comply with subpart G or with any of the alternative sets of regulations in Subparts C through L. Rather, the Department improvised an ad hoc procedure as it went along, without advance notice to claimants of the procedural standards to which they would be held. The failure of the Department to follow any pre-existing procedure or to give claimants notice of the rules to be applied resulted in serious prejudice to these claimants. Both Ms. Patton's

recommended Decision and Assistant Secretary Gerard's determination demonstrate that the claims were denied on the basis of an evidentiary rule never disclosed to claimants before or at the hearing.

Thus, the Department took the position that the uncontradicted affidavits of the claimants and their psychiatrists as a matter of law could not constitute credible evidence sufficient to establish the claims, solely because such testimony was not subject to cross examination. This evidentiary rule was never disclosed to claimants before or during the hearing.

Cross examination, is certainly a useful tool in ascertaining the truth. Nonetheless, it is wholly unreasonable to hold that these claimants or their attorneys should have known that testimony not subject to cross examination would as a matter of law be considered incredible by the Department, especially where that testimony was totally uncontradicted. It

must be emphasized that the only evidence of record contradicting claimant's affidavits was the bald denial of the alleged molester George DeBoef, itself not under oath or subject to cross examination.

Certainly none of the alternative evidentiary rules contained in Part 4 justify ignoring uncontradicted affidavits. On the contrary, all the evidentiary rules contained in Part 4 expressly provide that documents and affidavits not ordinarily admissible under generally accepted rules of evidence may be admitted at administrative hearings. Sections 4.121, 4.365(b), 4.780, 4.835. The weight to be given such documentary evidence is within the sound discretion of the decision maker, but no regulation authorizes the wholesale rejection of uncontradicted affidavits solely because no cross-examination was available. Furthermore, it has been held that even "rank hearsay" can constitute substantial evidence in an

administrative hearing "depending on the applicable regulations." McKee v. United States, 500 F.2d 525, 528 (Ct. Cl. 1974). Where no regulation so provided, claimants could not have anticipated that the Department would adopt a rule that uncontradicted affidavits could not constitute credible evidence. The Treaty of 1968 does not suggest such a rule. The only "proof" requirement imposed on claimants by the Treaty is that proof be "made to the agent." Now, 111 years after the Treaty was signed, 17 months after this suit was filed, and after the hearing was held, the Department has imposed the additional requirement that the "proof" must be subject to cross examination or it will be disregarded. This evidentiary rule by which uncontradicted affidavits must be ignored is only the most egregious example of prejudice to claimants from the Department's failure to follow any established rules of procedure.

In conclusion, Plaintiffs respectfully ask this court to take note of the fact that they have not requested summary judgment against the United States. Plaintiffs are willing and desirous of the opportunity to prove their case; they ask only for a fair hearing with procedural safeguards due to the extremely sensitive nature of their complaints, before an impartial forum. Under all the circumstances as indicated hereinabove a de novo trial is particularly appropriate. Brown v. United States, 396 F.2d 989 (Ct. Cl. 1968); Bray v. United States, 515 F.2d 1383 (Ct. Cl. 1975); Moore-McCormack Lines, Inc. v. United States, 413 F.2d 568 (Ct. Cl. 1969).

Wherefore, for all of the reasons stated above, petitions respectfully pray that this Court issue a Writ of Certiorari to the Court of Claims to review these Treaty claims to avoid a gross injustice and to further avoid the

inevitable confusion and uncertainty which will otherwise prevail with respect to similar cases.

Respectfully submitted,

Alan R. Taradash
DNA-People's Legal Services, Inc.
P.O. Box 306
Window Rock, Arizona 86515
Telephone: 602/871-4151

January 1981.

APPENDIX

ORDERS BELOW

Orders of the Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

Nos. 505-77 through 515-77

CALVIN BEGAY, et al.,	)	
	)	
Plaintiffs,	)	Indian Claims;
	)	Treaty provision;
v.	)	court ordered
	)	hearing; failure
THE UNITED STATES,	)	to exhaust ad-
	)	ministrative re-
Defendants.	)	medies.

Alan R. Taradash, attorney of record, for plaintiffs. Wayne H. Bladh, of counsel.

Thomas J. Riley, with whom was Assistant Attorney General James W. Moorman, for defendant, David C. Cannon, Jr., of counsel.

Before KASHIWA, Judge, Presiding, KUNZIG and BENNETT, Judges.

ORDER

These Navajo treaty claims come before the court again on defendant's

motion for summary judgment. Plaintiffs, eleven minor Navajo females and their parents or guardians, bring claims amounting to over ten millions dollars under Article I and VI of the 1868 treaty between the Navajo Nation and the United States. 15 Stat. 667 (June 1, 1868). Given plaintiffs' failure to exhaust their administrative remedies and properly challenge the administrative decision, we are compelled to grant defendant's motion for the reasons stated below.

Article I provides that "If bad men among the whites, or among other people subject to the control of the United States, shall commit any wrong upon the person ... of the Indians, the United States will, upon proof [to the Assistant Secretary of the Interior for Indian Affairs], reimburse the injured person for the loss sustained." See Hebah v. United States, 192 Ct. Cl. 785, 428 F.2d 1334 (1970). Plaintiffs claims under Article I rest upon the alleged sexual assault and

abuse of the minors by a white guidance counsellor or two Navajo aides while the minor plaintiffs were students at the Teec Nos Pos Boarding School on the Navajo Reservation.

Article VI provides for the establishment of a compulsory school system by the government and the provision of teachers. Since the article also requires that such teachers will "faithfully discharge" their duties, plaintiffs argue that any sexual assault or abuse by such a teacher is a breach of Article VI and results in damages under Article I. Thus, plaintiffs Article VI claims here are also based on the alleged misconduct and restitutionary provisions of Article I.

Previously, defendant moved to dismiss plaintiffs' Article I claims on the grounds that plaintiffs had failed to exhaust their administrative remedies. Since Article I explicitly provides for the administrative review of claims by the Assistant Secretary (referred to in

the Treaty as the Commissioner of Indian Affairs), this court, on January 26, 1979, ordered an administrative hearing within ninety days or the claims would be deemed denied. Begay v. United States, Nos. 515-77 through 515-77 (order Jan. 26, 1979). Following that order, a hearing was held on the Navajo Reservation by Ms. Frances A. Patton of the Office of Hearing and Appeals, Washington, D.C., in accordance with 43 C.F.R. part 4 (1979). She reviewed the submitted evidence and recommended denying plaintiffs' claims for lack of proof. The Assistant Secretary accepted the hearing officer's decision and denied the claims. Thereafter, the case returned to this court and defendant moved for summary judgment.

Assuming, without deciding, that the treaty gives plaintiffs a cause of action, see Hebah supra, they are thwarted by its own terms. Article I specifices that the Assistant Secretary's decision determining whether to pay damages shall

be final and binding upon the parties. Thus, any review by us is limited to deciding whether the administrative decision is either arbitrary and capricious, unsupported by substantial evidence, or not in accordance with the law. Despite this obvious limitation, plaintiffs' attorney's litigation strategy at the hearing and before this court made a mockery of the explicit treaty requirements, the court ordered administrative hearing and our jurisdictional limitation.

Contrary to plaintiffs' argument that no rules have been published to govern treaty determinations, general rules governing hearings and appeals before the Department of the Interior are found in 43 C.F.R. part 4. Moreover, prior to the hearing, the Assistant Secretary notified plaintiffs' attorney that he could present additional evidence, prepare and submit both proposed findings of fact and amendments to the hearing officer's recommendation. Furthermore, plaintiffs' were also

notified that the affidavits submitted to that point were insufficient to prove the claims. Incomprehensibly, plaintiffs' attorney failed to object to the proposed hearing format, rules for procedure and standards for determination until at oral argument before this court. Given the failure to attack the decision on the proper legal grounds, reserve his objections, submit proposed findings or provide comments on the hearing officer's decision for transmission to the Secretary, the claimants must be deemed to have failed to exhaust their administrative remedies.

Plaintiffs were aware that given the nature of their claims, the Department was unsatisfied with affidavits from four of the minors and the psychiatrist hired for all eleven. Their attorney refused to allow them to testify absent certain safeguards designed to protect them from the emotional trauma associated with retelling of the incidents. Yet, prior to the hearing, the Assistant Secretary provided that

> Because of the age of the minor plaintiffs and the nature of the incidents in which they were allegedly involved, the hearing will be closed to the public, and the hearing officer will take every reasonable precaution to minimize adverse affects in the hearing upon any minor who may be called to testify therein. [emphasis added].

Despite this offer, plaintiffs never requested their special precautions of the hearing officer; never lodged an objection to the procedures used; steadfastly refused to testify despite several plaintiffs having done so in other forums;[1/] and failed to make this argument prior to oral argument in violation of our rules. See Rule 144(a)(5).

Plaintiffs also presented us with numerous arguments concerning the validity of the hearing procedure for the

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[1/] Several testified before the Advisory Committee of the Navajo Tribal Council, were scheduled for the Civil Service Hearing of the guidance counsellor, and offers to testify were made earlier if defendant would provide certain documents.

first time at oral argument on appeal. At that time, plaintiffs' attorney conceded that; he had the opportunity to present proposed findings of fact-and failed to do so; he had the opportunity to comment upon the hearing officer's proposed decision-and failed to do so; and, he failed to request the precautions for testimony which the hearing officer was under a duty to accept if reasonable. Moreover, he complained that he received notification with insufficient time to prepare for the hearing, yet failed to request an extension of time. All told, these multiple derelictions amount to a virtual failure to prosecute, particularly when plaintiffs' are demanding over 10 million dollars of the taxpayers' funds. Given the fact that we have been presented with no basis upon which to find the Assistant Secretary's denial of these claims arbitrary and capricious, unsupported by substantial evidence or contrary to law, plaintiffs' Article I and VI claims are denied. Since

we decide the case on the failure to exhaust administrative remedies, we need not reach the parties' other arguments.

Accordingly, upon consideration of the litigants' submissions and after oral argument, defendant's motion to dismiss is granted. Plaintiffs' petitions are dismissed.

BY THE COURT

/s/ Shiro Kashiwa
Judge, Presiding

APPENDIX

ORDERS BELOW

Orders of the Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

Nos. 505-77 through 515-77

CALVIN BEGAY, et al.,)
)
Plaintiffs,)
)
v.)
)
THE UNITED STATES,)
)
Defendant.)

Before KASHIWA, Judge, Presiding, KUNZIG and BENNETT, Judges.

ORDER

This case comes before the court on plaintiffs' motion, filed July 18, 1980, for rehearing en banc, pursuant to Rules 7(d) and 151(b) with reference to the order entered herein on June 27, 1980. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges

of the court as to the suggestion for rehearing en banc under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiffs' said motion for rehearing be and the same is denied.

BY THE COURT

/s/ Shiro Kashiwa
Judge, Presiding

APPENDIX

ORDERS BELOW

Orders of the Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

Nos. 505-77 through 515-77

CALVIN BEGAY, et al.,	)	
	)	
Plaintiffs	)	Individual Indian claims; treaty claims for personal injury by "bad men"; suspension of proceedings to allow administrative decision.
	)	
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

Alan R. Taradash, for plaintiffs; Carolyn E. Slaby, attorney of record. Wayne H. Bladh, of counsel.

Thomas J. Riley, with whom was Assistant Attorney General James W. Moorman, for defendant. David C. Cannon, Jr., of counsel.

Before DAVIS, Judge, Presiding, KASHIWA and KUNZIG, Judges.

ORDER

Plaintiffs are eleven Navajo female minors, and their parents or

guardians, who have filed separate suits alleging that, while students at the Teec Nos Pos Boarding School on the Navajo Reservation (administered by the Bureau of Indian Affairs), the girls were each sexually abused and assaulted by male teachers, counsellors, or faculty aides at the school.[1/] The claims are based on Articles I and VI of the Treaty of 1868 between the United States and the Navajo Tribe, 15 Stat. 667.

1. Article I is identical with the treaty provision in Hebah v. United States, 192 Ct. Cl. 785, 428 F.2d 1334 (1970), 197 Ct. Cl. 729, 456 F.2d 696, cert. denied, 409 U.S. 870 (1972). It provides that "if bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property

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1/ Most of the charges are against a white, non-Indian counsellor, but two Navajos on the school faculty are also said to have been involved in some of the incidents.

of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, * * * reimburse the injured person for the loss sustained." In the first Hebah case, supra, we held that this court has jurisdiction under 28 U.S.C. §1491, of individual claims under this treaty provision; that the treaty covers, not only whites, but also Indians working for the Federal Government; and that the only prerequisite to suit is that the claimant first make "proof" to the "agent," with copy to the Commissioner of Indian Affairs.

Plaintiffs allege, and defendant does not contest, that such claims for damages were made on September 30, 1977 to the federal Director for the Navajo Reservation, and copies sent to the Assistant Secretary of Interior (who today stands in the place of the Commissioner of Indian Affairs for these purposes). The suits were filed in this court seventeen days

later, on October 17, 1977.

Defendant has moved to dismiss the petitions, insofar as the claims rest on Article I, on the sole ground that the plaintiffs failed to exhaust their administrative remedy since the seventeen days between the filing of the claims under the treaty and the commencement of these suits was too short for proper administrative consideration by the Interior Department. Apparently the Department has done nothing toward investigating the claims since the suits were filed on October 17, 1977.

Assuming with defendant that insufficient time for administrative consideration had elapsed when this litigation began in October 1977, the court cannot understand why nothing at all was done by the Interior Department after that time.[2/] The general circumstances were not wholly unknown in October 1977. Not only were the

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[2/] The Government's motion to dismiss was not even filed until February 17, 1978.

treaty claims then on file but administrative claims under the Federal Tort Claims Act had been presented (on behalf of six of the minor plaintiffs) almost a year previously (November 24, 1976) and had been denied by Interior in June 1977. Notice that a treaty claim would be made was filed on May 31, 1977 and very shortly thereafter the Interior field office requested proof of such claims from the Indians. Plaintiffs have filed an uncontroverted affidavit indicating that various personnel of the Interior Department were aware of these very complaints, beginning at least in 1976, and had had some inquiries made. In July 1977 the Navajo Tribal Council Advisory Committee conducted a hearing and decided to exclude the white accused (see footnote 1, supra) from the Reservation because of his asserted conduct toward his minor female students. Obviously there was sufficient information for the Interior Department to go forward to investigate the treaty claims formally

filed on September 30, 1977. We have been given no reason why this was not done, except that the defendant felt that it could get the petitions dismissed on the technical ground that insufficient time had elapsed at the moment of filing. This means to us no defense at all now that over a year has elapsed.

The unexcused failure to pass on the Article I treaty claims in the fifteen months since the petitions were filed[3/] might well warrant our now considering the claims to have been administratively denied through unreasonable delay, but in view of the specific references in Article I to administrative consideration[4/] we will not take that course but will allow the Department a period of ninety (90) days from the

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[3/] The motion to dismiss was argued orally in January 1979.

[4/] Article I declares that "no such damage shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs * * *." 15 Stat. at 667-68.

date of this order in which to make a decision upon the treaty applications filed by plaintiffs. No extension of time will be granted except for truly extraordinary circumstances. Meanwhile further proceedings in this court will be suspended.

2. Defendant's motion to dismiss also urges that the claim under Article VI should be dismissed for failure to state a claim. Article VI provides for education and schooling for Navajo children and includes, among its stipulations, that the Federal Government will provides competent teachers who will "faithfully discharge his or her duties as a teacher." 15 Stat. at 669. The Government urges that Article VI has not (under its terms) been in effect since 1878[5/] and that in any event it does not cover individual (non-tribal) claims for personal injuries inflicted on students by teachers.

5/ The last sentence of Article VI of the 1868 Treaty reads as follows: "The provisions of this article to continue for not less then ten years."

We do not and need not consider Article VI at this time. Plaintiff's claim can stand under Article I alone and nothing substantial would be added to the proof of either side through invocation of Article VI. The duration and coverage of Article VI is now pending before the court in Navajo Tribe of Indians v. United States, No. 69 (on transfer from the Indian Claims Commission), a much more far-reaching litigation, and it is inappropriate to pass on Article VI in this case where it is unnecessary to do so at this stage.

IT IS THEREFORE ORDERED that:

1. Defendant's motion to dismiss is denied with respect to the claims under Article I of the Treaty;

2. Proceedings in this court will be suspended for a period of ninety (90) days from the date of this order to enable the Assistant Secretary of Interior to make a decision on plaintiffs' applications under Article I of the Treaty, and that period will not be extended except

for truly extraordinary circumstances; and

3. Defendant's motion to dismiss is denied without prejudice with respect to the claims under Article VI of the Treaty.

BY THE COURT

/s/ Oscar H. Davis
Judge, Presiding

APPENDIX

AFFIDAVITS BELOW

Affidavit of the Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

Nos. 505-77 through 515-77

CALVIN BEGAY, et al.,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

PLAINTIFF'S EXHIBIT A
AFFIDAVIT OF ATTORNEY FOR PLAINTIFFS PURSUANT TO RULE 101(g)

STATE OF ARIZONA)
) ss.
County of Apache)

ALAN R. TARADASH, being first duly sworn upon oath states as follows:

1. This affidavit is made on personal knowledge of Affiant. Affiant is the attorney for plaintiffs in this action and is personally familiar with the efforts of plaintiffs to obtain redress of their grievances from the various federal agencies

named herein. The statements made herein are true and accurate to the best of Affiant's knowledge.

2. Affiant presents this affidavit pursuant to Rule 101(g), in the event the Court deems it necessary to determine at this time whether the decision of Assistant Secretary of the Interior Gerard, dated 26 April 1979, was lawful and rendered in good faith.

3. The facts essential to establish that the decision of 26 April 1979 was unlawful and rendered in bad faith must in large part be elicited from employees and officials of the Department of the Interior and other witnesses adverse to plaintiffs. The departmental actions and refusals to act leading up to the decision of 26 April 1979 involved officials within the office of the Secretary of the Interior, the Navajo Area Field Solicitor, the Navajo Area Bureau of Indian Affairs, the Federal Bureau of Investigation, the Justice Department, the Shiprock Agency Office of the

Bureau of Indian Affairs, past and present employees of the Teec Nos Pos Boarding School, the United States Attorney for Arizona, and others. These facts can be elicited and presented to the Court only through discovery procedures and/or evidentiary hearings. Plaintiffs simply do not have personal knowledge of these facts, and therefore cannot present them by affidavit. If the Court deems it necessary and allows discovery and evidentiary hearings on this issue, plaintiffs will present evidence to establish that the decision dated 26 April 1979 was based on procedures and decisions of defendant's agents which amounted to a gross deprivation of due process rights and a flagrant breach of the trust responsibilities of the United States, thereby rendering that decision unlawful and in bad faith.

/s/ Alan T. Taradash
Attorney for Plaintiffs

SUBSCRIBED and SWORN to before me this 16th day of January, 1980.

/s/ Carole A. Slinkey
Notary Public

My Commission Expires:
January 5, 1981.

APPENDIX

AFFIDAVIT BELOW

Affidavit of the Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

Nos. 505-77 through 515-77

CALVIN BEGAY, et al.,)
)
Plaintiffs,)
)
v.) AFFIDAVIT OF
) ALAN R. TARADASH
THE UNITED STATES,)
)
Defendant.)

STATE OF ARIZONA)
) ss.
COUNTY OF APACHE)

I, ALAN R. Taradash, being first duly sworn upon my oath do hereby depose as say as follows:

1. The statements made herein are based on my personal knowledge and are true and accurate;

2. On August 25, 1976, I interviewed George DeBoef, guidance counselor at the Teec Nos Pos Boarding School, Calvin Lucas, principal at the Teec Nos Pos Board-

ing School, guidance supervisor, and Barbara Holliday, dormitory aide. All of these interviews were tape recorded with the knowledge of the interviewee and all interviews were conducted in the office and presence of Calvin Lucas, principal. The subject matter of these interviews was the sexual assaults and rapes of Teec Nos Pos Boarding school children, in particular, Sharon Johnson, by Mr. George DeBoef. These interviews contain material factual disagreement between DeBoef and his supervisors.

3. On September 1, 1976, Goerge DeBoef voluntarily took a polygraph exam at the Navajo Police Department in Window Rock, Arizona. Said exam was administered by Capt. William Kellog, a certified polygraph examiner. The subject matter covered by said examination was the sexual assault and rape of Sharon Johnson by George DeBoef. Capt. Kellog reported that he ran several valid tests on DeBoef and determined that DeBoef was not telling the truth. This

polygraph exam was provided to the United States Attorney in Phoenix, Arizona by FBI agent Dave Vessel in October 1976.

4. In May of 1977 I had three meetings with Dale Itschner, the United States Field Solicitor in Window Rock, Arizona. These meetings were all at his office in Window Rock and were attended as well by Carolyn Slaby and William Back. During my May 2, 1977 meeting with Itschner I offered to provide him with the taped interviews referred to in paragraph 2 above. That offer was accepted and I subsequently gave him the tapes which he returned after having them in his possession for several weeks. On May 2, 1977, I told Mr. Itschner that DeBoef had taken and failed the polygraph exam mentioned in paragraph 2 above. I offered to provide Mr. Itschner with the exam. He refused that offer.

5. On May 19, 1977 I met again with Itschner. He informed me that the

United States Attorney in Phoenix had declined to prosecute DeBoef. He also showed me a copy of a letter dated April 12, 1977, Re 70-9300, to Michael D. Hawkins, U.S. Attorney in Phoenix from FBI Special Agent in Charge Leon M. Gaskill, wherein Agent Gaskill describes an incident in February of 1977 when George DeBoef sexually molested, Carla Joe, a student at Teec Nos Pos Boarding School. Itschner refused to give me a copy of that letter and (in referring to the reason for the declination of the U.S. Attorney) remarked that " ... after all, what did the guy [DeBoef] do? He just 'coped a feel'."

/s/ Alan R. Taradash

SUBSCRIBED and SWORN to before me this 15th day of July, 1980.

/s/ Carole A. Slinkey
Notary Public

My Commission Expires:

January 5, 1981.

APPENDIX

AFFIDAVITS BELOW

Affidavits of the Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

Nos. 505-77 through 515-77

BEGAY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	AFFIDAVIT
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

CAROLYN E. SLABY and ALAN R. TARADASH, being first duly sworn, depose and say:

1. We are attorneys of record for plaintiffs in the above-captioned and numbered actions.

2. All of the following statements of fact are made on the basis of our personal knowledge of the truth thereof.

3. We were retained by the plaintiff families in August, 1976 to in-

vestigate allegations that their daughters had been sexually molested by employees at Teec Nos Pos Boarding School.

4. On August 26, 1976 Taradash met with the Chief of the Navajo Police Department, Roland Dart, and apprised him of the allegations of plaintiff Mrs. Rosemary Johnson and of our preliminary investigative findings. Dart offered the assistance of the Navajo Police Department and suggested that he contact the FBI (Flagstaff office) to determine if they were aware of the "Teec Nos Pos Case".

5. On August 27, 1976 at 10:20 a.m. Taradash telephoned Dart, and Dart said that he has spoken with FBI Agent Vessel (of the FBI Flagstaff office) on August 26, 1976. In that telephone conversation Vessel told Dart that the FBI already had an "open file" on the "Teec Nos Pos case," said file being open on June 11, 1976.

6. On August 27, 1976 at 10:25 a.m. Taradash telephoned Agent Vessel at Vessel's Flagstaff office. Vessel said

that the FBI had begun an investigation into the "Teec Nos Pos Case" on June 11, 1976. Vessell further stated that the Secretary of Interior had been notified of the case and the FBI investigation in the second week in June, 1976. Vessel also stated that he would advise Taradash of the status of the FBI investigation as it progressed although he could not disclose the actual investigation findings because of FBI policy.

7. In the first part of September of 1976 Taradash met with FBI Special Agent Harvey Kogut and Dart in Dart's office. Taradash discussed his investigation findings to date with Dart and Kogut. Kogut was noncommittal with respect to what the FBI had done or would be willing to do about the "Teec Nos Pos Case."

8. Taradash telephoned Vessel, several times thereafter. As Vessel was always out of his office messages were left requesting a return call. Vessel never returned the calls. Slaby telephoned Vessel

several times in September, 1976, but he was always out. On October 19, 1976 Slaby sent Vessel a letter demanding to know the status of the FBI investigation. He did not respond.

9. In October 21, 1976, Slaby talked to Vessel on the telephone. He told her that he had received an investigative report concerning the alleged assaults done by the Bureau of Indian Affairs (BIA) investigator in Shiprock, New Mexico. He said he could not remember the investigator's name, but that the investigation took place in May, 1976. Vessel informed her that he had presented the investigative report to the U.S. Attorney in Phoenix on September 13, 1976. A few days later he received a written declination to prosecute from the U.S. Attorney's office. Vessel further advised her that based on the declination, his office would not conduct a criminal investigation.

10. On November 2, 1976, Slaby received a telephone call from Roy Newberg,

BIA social services representative in Shiprock, New Mexico. He informed her that Shiprock Area Superintendent Edward McCabe had ordered Newberg to conduct an investigation of the "Teec Nos Pos Case."

11. On December 16, 1976, Slaby met with Newberg. He told her that a current investigation was being conducted by BIA special officer Edward Boggio and Assistant George Barbar.

12. In February, 1977, Slaby spoke to Newberg on the telephone. He informed her that the May, 1976 BIA investigation had been conducted by Investigator Goodlick of the BIA Branch of Law and Order.

13. On February 23, 1977, Slaby met with Donald Dennison, home living specialist at Teec Nos Pos Boarding School. He informed her that another child had been sexually molested by George DeBoef on February 13, 1977.

14. On February 28, 1977, Slaby spoke to Dennison. He informed her that

the matter of the February 13th assault had been turned over the the BIA Division of Law Enforcement in Shiprock, New Mexico. He stated that BIA agent Keith Joey had been at the school taking to employees and investigating the matter.

15. On May 2, 9 and 19, 1977, Taradash and Slaby met with Dale Itschner, United States Field Solicitor for the Navajo Reservation. We discussed the "Teec Nos Pos Case" and the tort claims six of the plaintiffs had pending. Itschner indicated he intended to deny them. We informed him of our intention to file Article I Navajo Treaty claims in the U.S. Court of Claims. He said he would handle the Article I claims and tort claims separately.

16. On May 25, 1977 Taradash met with Wallace Green, Assistant to James Joseph (the Undersecretary of the United States Department of the Interior). Green and Joseph were in Window Rock, Arizona on other matters. Taradash discussed the

"Teec Nos Pos Case" with Green and told Green of the inaction of the local federal authorities. Green said he and Joseph were concerned and should be apprised of any dealings with the local BIA officials. He further stated that they would give the local BIA people the opportunity to resolve the situation before intervening from Washington.

17. On May 31, 1977, Slaby wrote a letter to BIA Area Director Donald Dodge, stating the facts of the sexual assaults on plaintiffs and making claims for damages under Article I. Slaby sent copies of the letter by certified mail to Undersecretary of Interior James Joseph, Assistant to the Undersecretary Wallace Green, Attorney General Griffin Bell, and others. A true and authentic copy of this letter is attached hereto as "Exhibit A."

18. On June 1, 1977, Taradash met with Dodge and hand-delivered the May 31st letter to him. Dodge informed Taradash that he would begin conducting an investi-

gation immediately concerning the assaults. He assured Taradash that we would be informed of the results of the investigation. Plaintiffs' counsel were never notified, either orally or in writing, of any such results.

19. On June 6, 1977, Taradash and Slaby met with Itschner. He stated that Slaby's May 31st letter would be forwarded to the Department of Interior together with Dodge's request that officials in Washington, D.C. handle the claims. Itschner discussed the conflict, in his capacity as U.S. Field Solicitor, between defending BIA employees and protecting the plaintiff's interests. He stated that he did not perceive his role as advocate for the children who claimed that they were sexually assaulted.

20. On June 7, 1977, Slaby met with Dodge. He advised her that Joseph had been informed about the May 31st letter.

21. On June 21, 1977, Barr

Taylor, M.D., and Slaby met with Dodge. Dr. Taylor is a psychiatric consultant for plaintiffs. He described to Dodge the nature and extent of injuries that plaintiffs suffer as a result of the sexual attacks.

22. On July 12, 1977, the Navajo Tribal Council Advisory Committee passed a resolution to have a hearing on July 26, 1977 to consider whether it should exclude George DeBoef from the Reservation.

23. On July 18, 1977 Slaby spoke to Itschner. He informed her that Secretary of Interior Andrus had been informed of the forthcoming hearing. He stated that he was waiting for directions from the Secretary whether to defend DeBoef at the hearing.

24. On July 25, 1977 Slaby spoke to Itschner. He advised her that Andrus had instructed him not to defend DeBoef at the hearing.

25. On July 26, 1977, the Navajo Tribal Council Advisory Committee conducted

its hearing. After hearing testimony by plaintiffs and Dr. Taylor, the Advisory Committee passed a resolution permanently excluding DeBoef from the Navajo reservation.

26. On September 30, 1977 Slaby wrote another letter to Dodge stating the amounts of damages plaintiffs were demanding for the claims made in the May 31, 1977 letter. Slaby sent copies of the letter by certified mail to Joseph Green, Bell and others. A true and authentic copy of this letter is attached hereto as "Exhibit B". Slaby received no oral or written response to her letter from anyone in the BIA or Department of Interior. Therefore, as stated in the September 30th letter, suits on behalf of plaintiffs were filed on October 17, 1977.

/s/ Carolyn E. Slaby

STATE OF ARIZONA)
) ss.
COUNTY OF APACHE)

SUBSCRIBED and SWORN to before me this 18th day of March, 1978.

/s/ Rosalita Becenti
Notary Public

My Commission Expires:

May 23, 1980

STATE OF ARIZONA)
) ss.
COUNTY OF APACHE)

SUBSCRIBED and SWORN to before me this 17th day of March, 1978.

/s/ Rosalita Becenti
Notary Public

My Commission Expires:

May 23, 1980

APPENDIX

AFFIDAVIT BELOW

Affidavit of the Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

Nos. 505-77 through 515-77

CALVIN BEGAY, et al.,)
)
Plaintiffs,)
)
v.)
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

AFFIDAVIT OF FRANCES A. PATTON

Personally appeared Frances A. Patton, who being duly sworn, deposes and says that:

1. I am a lawyer employed by the U.S. Department of the Interior as an Attorney-Advisor (GS-905-15) in the Department's Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia; and my job title is Special Assistant to the Director of the Office of Hearings and

Appeals.

2. I was designated by the Director of the Office of Hearings and Appeals to conduct the fact-finding hearing ordered by the Assistant Secretary--Indian Affairs, Mr. Forrest J. Gerard, in his letter addressed on March 9, 1979, to Alan R. Taradash, Esquire, in the matter of the individual Indian Claims Nos. 505-77 through 515-77, Calvin Begay, et al. and Related Cases v. The United States of America, in the United States Court of Claims, and to issue findings and a recommended decision in the matter.

3. In conducting the hearing and writing the Findings and Recommended Decision which I issued on April 5, 1979, in the proceedings, I adhered to procedural standards provided in Department Hearings and Appeals Procedures within 43 C.F.R. Part 4 and particularly Subpart G thereof which provides special rules applicable to appeals and hearings in matters not within the administrative jurisdiction of one of

the formal appeals boards of the Office of Hearings and Appeals. Section 4.704 of Subpart G provides that "Any hearing on such appeals shall be conducted by the Ad Hoc Appeals Board or a member or members thereof, or by an administrative law judge of the Office of Hearings and Appeals and shall be governed insofar as practicable by the regulations applicable to other hearings under this part."

/s/ Frances A. Patton

SUBSCRIBED and SWORN to before me this 10th day of June, 1980.

/s/ Nela M. Thompson
Notary Public

My Commission Expires:

July 28, 1980.

APPENDIX

AFFIDAVIT BELOW

Affidavit of the Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

Nos. 505-77 through 515-77

CALVIN BEGAY, et al., Plaintiffs,	)	
v.	)	AFFIDAVIT OF WAYNE H. BLADH
THE UNITED STATES, Defendant.	)	

STATE OF ARIZONA)
) ss.
COUNTY OF APACHE)

1. I am an attorney employed by DNA-People's Legal Services, Inc. and I maintain my office in Window Rock, Arizona.

2. On 27 June 1980, I placed a telephone call to the Interior Department Office of Hearings and Appeals in Arlington, Virginia at approximately 11:50 a.m. MDT. I spoke with a woman who identified herself as Frances Patton. I identified myself and asked Ms. Patton whether she had been

an Administrative Law Judge on the date of the hearing held in Window Rock, Arizona on 28 March 1979 as part of the claims of Calvin Begay, et al. v. United States. Ms. Patton informed me that she is not now, was not then, and has never been an Administrative Law Judge.

3. I make this affidavit on my personal knowledge and affirm that each and every statement in this affidavit is true and accurate to the best of my knowledge.

/s/ Wayne H. Bladh

SUBSCRIBED and SWORN to before me this 15th day of July, 1980.

/s/ Carole A. Slinkey
Notary Public

My Commission Expires:

January 5, 1981.

No. 80-1124

In the Supreme Court of the United States

OCTOBER TERM, 1980

CALVIN BEGAY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

JACQUES B. GELIN
KAY L. RICHMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Court of Claims properly dismissed petitioners' claims for damages on the ground that petitioners had declined to testify in the administrative hearing on their claims or to make timely objections to hearing procedures and that, accordingly, the administrative decision denying those claims for lack of proof was not shown to be arbitrary and capricious, unsupported by substantial evidence, or contrary to law.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1124

CALVIN BEGAY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims ordering that an administrative hearing on petitioners' claims be held within 90 days (Pet. App. 12A-20A) and its order granting the government's motion to dismiss (Pet. App. 1A-9A) are unreported.

JURISDICTION

The judgment of the Court of Claims was entered on June 27, 1980. A timely petition for rehearing was denied on October 3, 1980 (Pet. App. 10A-11A). The petition for a writ of certiorari was filed on January 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

The petitioners, 11 Navajo girls and their parents or guardians, filed suits in the Court of Claims on October 17, 1977, alleging a right to compensation under Articles I and VI of the Treaty of June 1, 1868, between the United States

and the Navajo Tribe, 15 Stat. 667, 669 (Pet. 2-5). Article I of the Treaty provides in pertinent part (15 Stat. 667):

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

Article VI provides for education and schooling for Navajo children and stipulates, *inter alia*, that a competent teacher will be furnished who will "faithfully discharge his or her duties as a teacher." 15 Stat. 669. Petitioners alleged that, while students at the Teec Nos Pos Boarding School on the Navajo Reservation (administered by the Bureau of Indian Affairs), the girls were each sexually abused and assaulted by male teachers, counsellors, or faculty aides at the school.

Seventeen days prior to filing suit, on September 30, 1977, petitioners had submitted claims for some $10 million in damages to the federal director of the Navajo Reservation, with copies sent to the Assistant Secretary of the Interior, who today stands in place of the Commissioner of Indian Affairs under the Treaty (Pet. App. 2A, 14A-15A). Asserting that 17 days did not provide sufficient time for proper administrative consideration by the Interior Department, the government moved to dismiss the petitions on the ground that petitioners failed to exhaust their administrative remedies (*id.* at 15A). On January 26, 1979, the Court of Claims, noting the Treaty requirement of administrative consideration (*id.* at 17A), suspended further court proceedings for a period of 90 days to enable the Assistant

Secretary to make a decision on petitioners' claims (*id.* at 19A) (*Begay* I).

On March 9, 1979, after the Court of Claims issued this order, the Assistant Secretary wrote petitioners' counsel, informing him that "the [petitioners'] claims do not sufficiently inform us of what actually happened, including when the alleged incidents occurred and what damages, if any resulted" (App., *infra*, 1a).[1] He further stated (*ibid.*) that a hearing would be held on March 28, 1979, before a hearing officer from the Department's Office of Hearings and Appeals, and that it would be limited to, *inter alia*, "receipt of testimony and documents relating to the matters indicated above." After noting that the attorney from the Department's Field Solicitor's Office would cross-examine those witnesses whom petitioners' counsel presented, the Assistant Secretary added (*id.* at 2a) that "[b]ecause of the age of the minor [petitioners] and the nature of the incidents in which they were allegedly involved, the hearing will be closed to the public, and the presiding officer will take every reasonable precaution to minimize possible adverse affects [*sic*] of the hearing" upon those called to testify.

On the scheduled day, the hearing was held at the Navajo Reservation, but petitioners presented no witnesses; instead petitioners' counsel served a letter on the Department's attorney announcing petitioners' refusal to present any testimonial evidence (App., *infra*, 7a). The hearing officer thereafter recommended that the claims be denied for lack of proof (Pet. App. 4A). The Assistant Secretary accepted this recommendation and formally denied the claims, stating in part (App., *infra*, 9a):

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[1] "App., *infra*" refers to the appendix to this brief, in which we have reproduced the Assistant Secretary's letter of March 9, 1979, and his final decision, which was communicated in a letter to petitioners' counsel dated April 28, 1979.

> Since the only way these claims of sexual abuse can be established is through the testimony of the minors who claim they occurred and since you continue to refuse to permit them to testify with respect to these matters, we are precluded from ascertaining the facts needed to prove the claims. We have no alternative, therefore, but to deny the claims for want of proof. They are hereby so denied.

The case then returned to the Court of Claims, where the petitions for damages were dismissed on the government's motion (*Begay* II) (Pet. App. 1A-9A). The court held (Pet. App. 2A, 5A-9A) that petitioners had failed properly to avail themselves of opportunities for challenging the recommended decision and the hearing procedures when the case was pending before the Assistant Secretary and that, accordingly, they had failed to exhaust their administrative remedies. The court also noted that, since the decision of the Assistant Secretary was "binding" under Article IV of the Treaty (15 Stat. 668), it could not grant de novo review of the claims; instead the court considered whether the Assistant Secretary's denial of the claims for lack of proof was "arbitrary and capricious, unsupported by substantial evidence or contrary to law" (Pet. App. 4A-5A, 8A). Concluding that the decision was not improper under those tests, it dismissed the petitions (*id.* at 8A-9A).

ARGUMENT

Petitioners contend that the Court of Claims erred in approving the Assistant Secretary's denial of their claims for inadequate proof. More specifically, they assert that the proof they offered should have been deemed adequate to entitle them to prevail (Pet. 12-15, 18-19, 26-28) and that the hearing procedures denied them due process (Pet. 20-26, 29). These contentions are without merit, but in any event, the questions raised have little significance beyond the unique circumstances of this case and, accordingly, do not warrant review by this Court.

1. Petitioners are asking the United States to pay millions of dollars in damages for injuries allegedly inflicted on the minor petitioners in the manner reported in their affidavits. Even granting that the denial of the man accused as the principal malefactor was a "bald denial" (Pet. 27), the Assistant Secretary not unreasonably believed that he should not pay out large sums of the government's money until he at least had more detailed information concerning what actually happened. Testimony by the minor petitioners, subject to cross-examination, with "every reasonable precaution to minimize possible adverse affects [*sic*] of the hearing" (App., *infra*, 2a) was a reasonable means of securing an adequate basis for the Assistant Secretary's decision.

Contrary to petitioners' suggestion (Pet. 12-15), the Court of Claims' decision in *Hebah* v. *United States*, 428 F. 2d 1334 (1970) ("*Hebah* I") and in *Begay* I do not establish that the submission of written evidence, not supplemented by testimony subject to cross-examination, adequately proves their claims and entitles them to damages. In *Hebah* I, the court found that the written proof submitted by the plaintiff under a treaty provision resembling Article I in the present case was sufficient to warrant a trial of plaintiff's factual contentions, not an immediate decision on her claims. 428 F. 2d at 1340. The Commissioner of Indian Affairs had failed to act in the matter or to concede that the plaintiff was entitled to file such claims, and the Court of Claims deemed the plaintiff to have exhausted her administrative remedies. *Ibid.* Accordingly, issues raised by the claims were tried by a Court of Claims trial commissioner, who heard testimony by witnesses and assessed their credibility before recommending that the claims be denied. *Hebah* v. *United States*, 456 F. 2d 696, 698, 710 (1972) ("*Hebah* II"). In *Begay* I, the Court of Claims concluded that the present petitioners had presented "sufficient information for the Interior Department to go forward to investigate the treaty claims" (Pet. App. 16A-17A). The

court accordingly disapproved the Department's delay in conducting such an investigation and reaching a decision; but, after rejecting the option of "considering the claims to have been administratively denied through unreasonable delay" (*id.* at 17A), the court gave the Assistant Secretary of the Interior 90 days in which to reach a decision on the claims. While it is true, as petitioners assert (Pet. 16-17), that the court did not order the Assistant Secretary to hold a hearing, it in no way suggested that he was precluded from holding such a hearing to gather the evidence needed for his decision; and as we have suggested, given the nature of petitioners' claims, it was reasonable for him to seek the testimony of the minor petitioners.

2. Petitioners' contention that they were the victims of unfair hearing procedures is similarly without merit. Instead, as the Court of Claims found, it was their "attorney's litigation strategy" that "made a mockery" of the hearing (Pet. App. 5A) and his "multiple derelictions" that "amount[ed] to a virtual failure to prosecute" and that warranted a finding that they had failed to exhaust their administrative remedies (*id.* at 8A).

The Assistant Secretary's letter of March 9, 1979, informed petitioners that their written proofs were inadequate, and his remarks concerning the scheduled hearing clearly indicated his expectation that petitioners would supplement their proof with testimony, subject to cross-examination by the Department's Area Field Solicitor. Had petitioners any doubts about this, had they wished to specify conditions under which the minor petitioners would testify, or had they objected to the hearing date as giving them inadequate time to prepare, they were free to communicate these concerns to the Assistant Secretary. They failed to do so. Thus their contentions that their claims were unfairly subjected to an "evidentiary rule never disclosed to [them] before or at the hearing" (Pet. 25-26) and that they

were not adequately apprised of the procedure to be followed (Pet. 24) are groundless.

Petitioners do not dispute the Court of Claims' findings (Pet. App. 8A) that they failed to make timely objections to the hearing procedures as announced in the Assistant Secretary's March 9, 1979, letter and failed to take advantage of opportunities to file proposed findings of fact with the hearing officer and to request modifications of her decision after it was issued. Instead, they focus on what they contend was an improper submission to the Assistant Secretary by the Department's Area Field Solicitor after the hearing (Pet. 22-24). While it is true that the Field Solicitor submitted factual material concerning the alleged sexual abuse incidents and previous investigations of those allegations, it is not the case that the Assistant Secretary rested his decision to deny the claims on the evidence. Indeed, it is plain that, with one exception, the Secretary considered the factual representations in a way that aided petitioners, since he viewed them as supplemental evidence in support of the claims, which nevertheless still left him "with insufficient proof" to warrant paying damages (App., *infra*, 9a). The exception was the Assistant Secretary's apparent acceptance (*id.* at 8a) of the Field Solicitor's assertion that petitioners' representatives have always taken the position "that the federal government was to have no access to the [minor petitioners] or their families." Petitioners may dispute this, but they do not deny their failure to testify at the March 28 hearing or to seek to make any arrangements to testify under appropriate safeguards at the hearing; hence this factual dispute is not material to the Assistant Secretary's denial of their claims for lack of proof and it is thus not material to the Court of Claims' determination (Pet. App. 8A) that the Assistant Secretary's denial of those claims was not shown to be "arbitrary and capricious, unsupported by

substantial evidence or contrary to law." Accordingly, the Court of Claims properly granted the motion of the United States and dismissed petitioners' claims.[2]

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[2]Because, under Article IV of the Treaty, the Assistant Secretary's decision was to be "binding," it is questionable whether the Court of Claims could review the decision on the merits; and it is clear that there would be no entitlement to de novo consideration of treaty claims. Thus petitioners were denied no rights by the standard of review employed by the Court of Claims. Petitioners attempt to support their contention (Pet. 29) that they are entitled to a trial de novo with cases that do not concern administrative decisions made under laws or treaties making them "binding" and that do not remotely support this argument. In *Brown* v. *United States*, 396 F. 2d 989 (Ct. Cl. 1968), a military pay case, the court concluded, although "judicial review limited to the evidence adduced before the agency is the usual practice," it was proper to consider evidence not presented to the administrative decisionmaker where the administrative hearing scheme was inadequate because of lack of opportunity for oral testimony, examination of witnesses, and cross-examination. *Id.* at 993, 995. In *Bray* v. *United States*, 515 F. 2d 1383, 1394-1395 (Ct. Cl. 1975), also a military pay case, the court found that the administrative procedure did not comport with due process where the serviceman was not allowed to cross-examine witnesses against him. Petitioners, however, are not seeking an opportunity to give oral testimony and to cross-examine other witnesses whose testimony would be used to rebut their claims; they argue that they should prevail without giving such testimony. In *Moore-McCormack Lines, Inc.* v. *United States*, 413 F. 2d 568 (Ct. Cl. 1969), the court reserved decision of the question whether it could review the merits of a decision by the Maritime Subsidy Board made "final" by statute; but it sent the case back to the Board because the plaintiffs had unfairly been denied access to the factual data and the reasoning on which the Board's decision was based. Here, as noted, the Assistant Secretary's decision to deny petitioners' claims rested on his determination that their proof was insufficient because of their failure to offer oral testimony by any of the minor petitioners; this reasoning is not secret and does not depend on undisclosed factual matters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

JACQUES B. GELIN
KAY L. RICHMAN
Attorneys

MARCH 1981

DOJ-1981-03

APPENDIX

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 9 1979

Alan R. Taradash, Esquire
P. O. Box 306
Window Rock, Arizona 86515

Re: *Calvin Begay, et al.*, and related cases v. *United States*, Nos. 505-77 through 515-77, in the United States Court of Claims

Dear Mr. Taradash:

Since the court entered its order dated January 26, 1979 in the above-captioned cases we have reviewed the material which we have on them. As a result of this review we find that the proof of claims made to date and the information otherwise available to us respecting the plaintiffs' claims do not sufficiently inform us of what actually happened, including when the alleged incidents occurred and what damages, if any resulted.

In order to afford plaintiffs an opportunity to provide such additional factual information on these matters as they may care to offer, a hearing before a presiding officer of the Office of Hearings and Appeals, Department of the Interior has been scheduled for 9:00 a.m., March 28, 1979 in Window Rock, Arizona. The hearing will be held in the Conference Room of the Division of Education, Bureau of Indian Affairs in the Old Club Building (Building No. 3).

Since the hearing will be entirely for fact finding purposes, it will be limited to receipt of testimony and documents relating to the matters indicated above, plus any evidence which

plaintiffs may care to introduce which they believe establishes that the persons involved in the incidents are "bad men among the whites, or among other people subject to the authority of the United States," within the meaning of Article I of the treaty with the Navajo Tribe of Indians of June 1, 1868, 15 Stat. 667.

You will, of course, be permitted to call and examine witnesses. Those witnesses will be subject to cross-examination by William Back, Esquire, Field Solicitor's Office, Window Rock. Because of the age of the minor plaintiffs and the nature of the incidents in which they were allegedly involved, the hearing will be closed to the public, and the presiding officer will take every reasonable precaution to minimize possible adverse affects [*sic*] of the hearing upon any minor who may be called upon to testify therein.

Mr. Back will not make any direct presentation, but in addition to cross-examining witnesses, he may provide evidence to the presiding officer which he believes clarifies evidence presented by the plaintiffs.

After the hearing the presiding officer will submit findings to me, with a copy of those findings simultaneously furnished to you and Mr. Back. Any modifications which you believe should be made in those findings must be submitted

to me within 10 days after your receipt of them. Thereafter I will make the final determinations of the Department of Interior on the plaintiffs' claims.

Sincerely,

/s/ Forrest J. Gerard
Assistant Secretary—Indian Affairs

cc: Director, Office of Hearings & Appeals
Attn: Frances Patton
William Back, Esq.
Field Solicitor
Window Rock, Arizona
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Attn: Thomas J. Riley, Esquire

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

APR 28 1979

Alan R. Taradash, Esq.
DNA-Peoples Legal Services, Inc.
P. O. Box 306
Window Rock, Arizona 86515

Re: Administrative determination of claims filed in *Begay* v. *United States*, Ct. Cl. Nos. 505-77 through 515-77

Dear Mr. Taradash:

On January 26, 1979, the Court of Claims suspended further proceedings in the above-captioned case for a period of 90 days to permit the Assistant Secretary of Interior to make a decision on plaintiffs' application under Article I of the Treaty of 1868 between the United States and the Navajo Tribe, 15 Stat. 667.[1] This letter constitutes that determination.

On October 17, 1977, the present litigation was instituted after your office sent a letter dated September 30, 1977 to the Navajo Area Director asking that within two weeks

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[1]Article I of the Treaty reads, in pertinent part:

* * *

"If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indians Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained."

* * *

specific responses in writing be made to the demands stated in the letter. The September 30, 1977 letter demanded immediate indemnification on behalf of 11 minor Navajo girls in the total amount of $4,371,000 for alleged sexual abuses of the girls by three employees of the Bureau of Indian Affairs at the Teec Nos Pos Boarding School on the Navajo Indian Reservation. In addition, there was demanded on behalf of the girls' parents damages in amount "yet to be determined at trial."[2] The abuses are alleged to have occurred on unspecified dates between 1967 and 1976.

Prior to the filing of the September 30, 1977 demands with the Navajo Area Director, there had been filed under the Federal Tort Claims Act claims on behalf of six of the minor plaintiffs. On June 10, 1977, all six claims were denied by the former Field Solicitor for this Department at Window Rock, Arizona. Four of the claims were denied because they were not filed within the two-year period required by the Federal Tort Claims Act. Two of the claims were denied on the grounds that the claimants failed to provide convincing evidence that the alleged acts occurred and that the claimants further failed to make a sufficient showing that the United States was negligent.

Following the filing of the present litigation on October 17, 1977, there was a delay in submitting our recommendations to the Department of Justice because of temporarily lost mail. Based on those recommendations, the Department of Justice filed a motion to dismiss on the ground there had not been any exhaustion of administrative remedies. In the alternative, since the Court of Claims in *Chambers* v. *United States*, No. 742-76, involving a claim under a

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[2]The total amount of damages sought in the litigation on behalf of the minors and their parents appears to be $10,152,000.

similar treaty provision had suspended proceedings in order to permit a Secretarial determination, a similar suspension was suggested for this case to permit such a decision. Without an indication from the Court that it would be proper to do so and in the absence of evidence from you that you desired us to proceed with an administrative determination while the litigation was pending, we perceived no basis for proceeding in the matter while the government's motion awaited decision.

You were not immediately notified after the January 26, 1979 order of the Court that there would be a hearing because, if possible, we wished to avoid having to hold a hearing at which the minor complainants would have to testify. But as related in our March 9, 1979 letter to you, (Attachment No. 1) on review we found that the proof of claims then made and the information otherwise available to us respecting the plaintiffs' claims did not sufficiently inform us of what actually happened including when the alleged incidents occurred and what damages, if any, resulted. Provisions, as set out in the March 9 letter, were made to protect any minor that you might call to testify in the hearing.

You appeared at the March 28, 1979 hearing at Window Rock, Arizona before Frances A. Patton, Special Assistant to the Director, Office of Hearing and Appeals. Pursuant to my March 9 letter, Mr. William Back of the Field Solicitor's Office, Window Rock also appeared. At the hearing you stated your position that under Article I of the 1868 Navajo Treaty the Government has an affirmative duty to investigate claims presented to it and that the plaintiffs have provided sufficient information to the Government to enable it to perform its duty under the treaty. Except for documents relating to the establishment and operation of the Navajo Victims' Rights Commission and other documents relating to the Navajo Tribe's exclusion from the

Navajo Indian Reservation of George DeBoef, the employee of the Bureau of Indian Affairs allegedly involved in most of the incidents complained of, no additional evidence was offered by you.

The reasons why you declined to present any testimony at the March 28 hearing are set forth in a letter dated March 28, 1979 from you to Mr. Back (Attachment No. 2). Its pertinent paragraphs read:

> "We do not intend to present any additional *testimonial* evidence at the hearing which Mr. Gerard, Assistant Secretary—Indian Affairs, scheduled for today; notice of which was received by me 15 days ago. Aside from the fact that the Department's conduct in the handling of these 'Teec Nos Pos cases' continues to be an egregiously willful breach of its trust responsibility to my clients and their Tribe, we will present some additional information at the hearing for the Department's consideration. All other information which we currently possess has either been given to the previous Field Solicitor, Mr. Itschner or has been offered to him and rejected. There may indeed be other relevant information in the possession of your office or other government employees. However, notwithstanding our repeated requests for access to such information, we have been given not one report or other bit of information which the government may possess relevant to my clients claims.
>
> Regarding any direct contact with our clients and their families, our position remains unchanged: *viz* neither you nor any other government employee, agent, investigator or independent contractor hired by or working for the government is to talk to, contact, or in any way whatsoever solicit information from any clients. We have in the past offered to Mr. Itschner to arrange for interviews with our clients in the presence of their

psychiatrists using a Navajo interpreter in whom the children have trust. The reasons for this have also been previously explained; namely, the psychological damage to the children, in having to relive the terror by retelling of the sexual abuse suffered by them at the hands of the government's employees, is as great or greater than that which they originally suffered from the incidents themselves. Given the Department's and your office's adversarial disposition to our clients from the beginning of these cases, this precaution is only reasonable.

The Department of Interior has all the information necessary to make its administrative decision. We expect it forthwith."

Mr. Back has responded to these statements about the information provided to or offered to the previous Field Solicitor, Mr. Itschner. His response is set out on pages 2-3 of his letter of April 12, 1979 to me, (Attachment No. 3) furnished in accordance with my March 9 letter. As stated in the April 12 letter, Mr. Itschner denies that offers were made to the federal government to interview the girls other than the offer to have several of the girls testify at the DeBoef removal hearing, which as explained in the letter has never been held. Mr. Itschner further stated that the position of the claimants' representatives has always been that the federal government was to have no access to the claimants or their families.

The time provided you by the March 9 letter in which to submit any suggested modifications of Ms. Patton's findings has expired and we have not received any submittal from you. The findings made April 5, 1979 by Frances A. Patton (Attachment No. 4) are hereby adopted and made part of this decision.

As you were advised by my March 9, 1979 letter, a review of the materials then available to us respecting the plaintiffs' claims was found to be insufficient to enable us to determine what actually happened, including when the alleged incidents occurred and what damage, if any, resulted. The additional information furnished by you at the March 28 hearing as well as the information provided by Mr. Back in his April 13, 1979 letter to me, still leaves us with insufficient proof of the claims.

Since the only way these claims of sexual abuse can be established is through the testimony of the minors who claim they occurred and since you continue to refuse to permit them to testify with respect to these matters, we are precluded from ascertaining the facts needed to prove the claims. We have no alternative, therefore, but to deny the claims for want of proof. They are hereby so denied.

Not only does this want of proof extend to the establishment of the facts constituting the alleged injuries but also to the failure to establish that the employees of the Bureau of Indian Affairs who are alleged to be responsible for plaintiffs' injuries are "bad men" within the meaning of Article I of the 1868 Navajo Treaty.

As related at page 5 of Ms. Patton's findings, you took the position at the March 28 hearing that the alleged wrongs committed upon the children and their families are the kind of conduct that compels a conclusion that Messrs. DeBoef, Clah and Ashley are bad men in the concept of the treaty. This reading of the treaty deprives the term "bad men" of any significance since under it the mere fact of the commission of a wrong makes the wrong-doer a "bad man." This would change the meaning of the treaty so that instead of being liable for wrongs committed by bad men, the United States would be liable for all wrongs.

In *Hebah* v. *United States*, 456 F. 2d 696 (1972), the Court of Claims did not determine whether the alleged wrong-doer was, under a treaty provision similar to the one involved here, a bad man, but only because the Court concluded no wrong had been committed. It is clear had the conclusion been that a wrong was committed that the Court would have then determined whether the wrong-doer was a bad man, in order to determine whether compensation under the treaty provision would be due the wronged party.

Sincerely,

/s/ Forrest J. Gerard
Assistant Secretary—Indian Affairs

Attachment

cc: Director, Office of Hearings & Appeals
Attn: Frances Patton
William Back, Esq.
Field Solicitor's Office
Window Rock, Arizona
Thomas J. Riley, Esq.
Land and Natural Resources
Department of Justice
All w/c attachments